Nos. 80-207, 80-213 and 80-214

In the Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission correctly determined that Section 312(a)(7) of the Communications Act provides an affirmative right of reasonable access to broadcast stations for individual candidates seeking federal elective office.

2. Whether the Commission correctly determined that petitioners failed to provide reasonable access as required by Section 312(a)(7).

3. Whether Section 312(a)(7), as applied by the Commission, is consistent with the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) is reported at 629 F.2d 1. The decision of the Federal Communications Commission (Pet. App. 69a-109a) is reported at 74 F.C.C.2d 631. The Commission's opinion and order denying reconsideration (Pet. App. 110a-151a) are reported at 74 F.C.C.2d 657.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1980. Petitions for rehearing filed by petitioners in Nos. 80-213 and 80-214 were denied on May 15, 1980. The petition for a writ of certiorari in No. 80-207 was filed on August 11, 1980. The petitions for a writ of certiorari in Nos. 80-213 and 80-214 were filed on August 13, 1980. The petitions were granted on November 3, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 312(a)(7) of the Communications Act, 47 U.S.C. 312(a)(7), provides:

> The Commission may revoke any station license or construction permit—
>
> * * * for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

2. Section 315(a) of the Communications Act, 47 U.S.C. 315(a), provides in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford

> equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate.

3. Section 4(i) of the Communications Act, 47 U.S.C. 154(i), provides in pertinent part:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

4. Section 303(r) of the Communications Act, 47 U.S.C. 303(r), provides in pertinent part:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall— * * * [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter * * *.

STATEMENT

The Proceeding Before the Commission

1. In early October 1979, the Carter-Mondale Presidential Committee advised petitioners ABC, CBS and NBC that it desired to purchase a thirty-minute time period during "prime time" on one of four alternative days—December 4, 5, 6, or 7, 1979. The Committee explained that it needed the time to present a documentary film setting forth the record of President Carter and his administration during the preceding three years. The requested time period coincided with President Carter's scheduled announce-

ment of his candidacy for reelection. The request also asserted that the 1980 campaign already had commenced, as evidenced by forthcoming caucuses and conventions and intensive media coverage (J.A. 35-40). Petitioners ABC and NBC both refused to offer any time in response to this request (J.A. 41-43). Petitioner CBS offered to sell two five-minute program segments, only one of which fell within "prime time" (J.A. 44-45). The networks' rejection of the Committee's request was based on their assertion that it was too early in the presidential campaign to begin selling time for political broadcasts, that any sale would force them to sell time to a substantial number of rival candidates, and that such sales would result in disruption of their regularly scheduled programming (J.A. 41-45, 52-93).

In view of the refusal of ABC and NBC to sell the Committee any time, and the refusal of CBS to sell time that responded to its request, the Committee filed a complaint with the Federal Communications Commission alleging that the networks had violated the "reasonable access" requirement of Section 312 (a)(7) (J.A. 27). The Committee asserted, *inter alia*, that (*id.* at 28-29):

> The prime time programming of all three networks is almost exclusively devoted to entertainment programming for commercial purposes. Each network on week nights (and Saturdays) schedules six half-hour prime time periods and eight on Sundays for a three network total of 132 per week or 528 per month.
>
> * * * * *
>
> * * * [T]he Committee is seeking to use the [requested] half-hour program for an appearance by the President shortly after he formally declares his candidacy * * *. The proposed program would stress the President's record and that of his administration. It is intended to set

> forth the basic case for renomination and thus it was desirable to air the program shortly after the announcement. It is planned to have the television appearance coincide with more than 2,000 small-donor, grass roots fundraising gatherings in communities throughout the country. * * *
>
> The request of the Committee was made nearly two months in advance of the air date in order to ease the scheduling burden on the networks * * *. Also, the time requested was selected so as not to interfere with the national ratings sweep period which is so important to network sales.

The Committee also asserted that it had not made any other requests for time, and, because of the expense of such time, it would not likely make any such additional requests in the near future (*id.* at 33). Finally, the Committee alleged that none of the reasons advanced by the networks for their refusal to sell the requested time was sufficient to justify their actions (*id.* at 29-32).

2. After considering the networks' responses to the Committee's complaint (J.A. 52-93), the Commission found that each network had acted unreasonably in responding to the request to purchase time and that each therefore had failed to fulfill its obligations under Section 312(a)(7) of the Communications Act (Pet. App. 69a).

Initially, the Commission rejected the networks' contention that it was "too early" in the presidential campaign to begin selling time for political broadcasts. The Commission identified numerous objective facts that led to the conclusion that the presidential campaign already was "in full swing" (Pet. App. 92a-94a).[1] The Commission therefore turned to a

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[1] The Commission relied on prior decisions establishing that the point when a broadcaster must afford reasonable access

consideration of the reasonableness of the networks' responses.

The Commission found that, in contravention of its previously announced legal standards (see *Report on Enforcing Section 312(a)(7)*, 68 F.C.C.2d 1079, 1090 (1978)), the networks had applied "blanket" policies in dealing with the request for time, rather than attempting in good faith to tailor their responses to the particular request of the individual candidate (Pet. App. 90a-101a). The Commission saw no evidence that the networks, in their responses to the Committee or in their pleadings, had given any consideration at all to the candidate's individual request. By failing to offer *any* time that would coincide with the President's planned announcement of his candidacy, NBC and ABC simply cut off the President's intended presentation to the public (*ibid.*). And by offering only five minutes in prime time to allow the Committee to summarize the President's record over a three-year period, CBS ignored the Committee's assertion that this was " 'totally insufficient' in amount to present the 'detailed and thoughtful' picture of the administration's record envisioned by the Committee * * *" (*id.* at 100a).

In addition to finding that the networks failed to make any reasonable attempt to tailor their responses to the stated request of the candidate, the Commission also found that the networks' reliance on countervailing factors was lacking in support. While the Commission acknowledged that broadcasters may

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varies depending upon the nature of the particular campaign (Pet. App. 88a-91a). The Commission previously had determined that "a presidential campaign may be in full swing almost a year before an election." *Report on Enforcing Section 312(a)(7)*, 68 F.C.C.2d 1079, 1091 (1978) (*1978 Report and Order*).

take into account the likelihood of requests for reply time from other candidates in determining whether to grant access to a particular candidate, it found that the danger of multiple requests in the present case was remote. The Commission explained that, in December 1979, it was unlikely that more than a small percentage of candidates would soon become "legally qualified" under the Commission's rules, and that, in any event, few candidates would "have the financial resources necessary to purchase a half hour of network prime time" (Pet. App. 96a).[2] Accordingly, the Commission concluded that the likelihood of requests from multiple candidates did not justify the networks' denials (Pet. App. 95a-96a, 99a-101a).[3]

Finally, the Commission rejected the contention that potential "programming disruption" justified the denial of access in this case. While the Commission acknowledged that disruption was a factor properly to be considered (*id.* at 97a), it found the likelihood of disruption to be minimal. The Commission observed (*id.* at 98a): "the request for time was made far in advance of the closing days of the campaign and nearly two months prior to the broadcast date. Furthermore, as the Committee has stated, 'it gave

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[2] A request for equal time under Section 315 of the Act must be presented to the broadcaster within seven days by a rival candidate who has qualified under the Commission's rules. 47 C.F.R. 73.1940(e). A half hour of prime time on CBS costs between $172,000 and $186,000 (J.A. 171).

[3] In reference to CBS's offer of 5 prime time minutes, the Commission observed (*id.* at 100a-101a): "Even if all 13 major party candidates were entitled to equal treatment, CBS' policy would result in the sale of only 65 prime time minutes—a total of miniscule proportions when it is realized that there are approximately 5400 minutes available in prime time in a single month."

the networks considerable leeway in providing availabilities' in that it listed four alternative dates for the broadcast, and we recognize that the networks in fact make frequent scheduling changes for their own commercial purposes."

3. In a subsequent order denying reconsideration of its original decision, the Commission rejected (Pet. App. 118a-119a) the networks' argument that Congress intended Section 312(a)(7) merely to codify prior Commission policy under the general "public interest" standard.[4] The Commission pointed out that it previously had considered and rejected that argument in its *1978 Report and Order*.[5] The Commission also clarified the principles applicable in determining when a campaign is underway and what amount of

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[4] As discussed on pages 22-23, *infra*, the Commission's "public interest" policy, which applied to all political broadcasts prior to the enactment of Section 312(a)(7), merely required broadcasters to make some time available for political programming. No obligation rested on broadcasters to give reasonable consideration to individual requests by candidates for air time. This general duty to offer some political programming applied without distinction to local, state and federal campaigns.

[5] In the *1978 Report and Order, supra*, 68 F.C.C.2d at 1088, the Commission stated: "We see no merit to the contention that Section 312(a)(7) was meant merely as a codification of the Commission's already existing policy concerning political broadcasts. There was no reason to commit that policy to statute since it was already being enforced by the Commission. Moreover, Congress limited the applicability of the 'reasonable access' provision to candidates for Federal elective office. The Commission's [prior] policy made no specific distinction between those candidates and candidates for state and local office. Therefore, it seems clear that Congress was creating a different, additional obligation which was to apply only to Federal candidates."

consideration must be given by a broadcaster to a candidate's request for time.

The Commission explained that, in deciding when a campaign has commenced—and therefore when it is no longer reasonable for broadcasters to deny requests for access on a blanket basis—the Commission would consider all relevant evidence tendered by the networks and the candidate. The Commission stated that, since "[n]either broadcasters nor candidates bring a perspective of total objectivity * * * to questions of the initial applicability of Section 312(a)(7)," determination of this threshold issue is an appropriate subject for the Commission's own "independent evaluation * * * taking into account the position of the candidate and the networks as well as other factors" (Pet. App. 124a).

In light of the networks' apparent misunderstanding of the original order's discussion of candidate needs, the Commission further explained the importance of, and the limitations on, that consideration. The Commission stated that the purpose for its focus on the needs of individual candidates was to ensure that broadcasters would give consideration to "each request in its own specific context on a particularized basis" (Pet. App. 126a).[6] The Commission emphasized that "the candidate's particular request is by no means conclusive of the question of how much time, if any, is appropriate," but rather is only one factor to be considered in the weighing process (*id.* at 128a). However, the Commission reiterated that a broadcaster must attempt "to tailor his offer of air time to be as

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[6] The Commission noted (*id.* at 135a) that "blanket determinations," of the kind found to exist here, "too easily allow decisions based on [the] broadcaster's own convenience or economic interest * * *."

reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking air time" (Pet. App. 128a). Thus, while broadcasters are not expected to evaluate or censor the subject matter of individual programs, to " 'second guess' the 'policital' wisdom * * * of longer versus shorter formats," or to assess the "candidate's subjective, personal, or immediate 'political' desires" (Pet. App. 127a), they should "consider the particular nature of the request made so that 'as much as possible' and 'within reasonable limits' airtime will be responsive to the candidate's needs" (Pet. App. 135a). In this case, the Commission explained, the networks clearly had made no effort at all to be responsive to the candidate's request (Pet. App. 137a-139a).

Finally, the Commission stressed the importance of a full explanation of the broadcaster's reasons for denying a candidate's request. The requirement of a full explanation is "essential to assuring that we do give careful consideration, and appropriate deference, to a broadcaster's discretion [because] [w]e must deal essentially with the broadcaster's own reasoning" (Pet. App. 136a). In this case, it was not possible for the Commission to defer to the networks because their explanation for their actions disclosed that they failed to consider those factors that the Commission previously had held must be considered in evaluating candidate requests. See *1978 Report and Order, supra*, 68 F.C.C. 2d at 1090; Pet. App. 135a-139a. In particular, the networks' refusals to afford air time rested on the erroneous legal conclusion that Section 312(a)(7) imposed no obligation on them to consider and attempt to accommodate the particular request of the individual candidate.

The Decision of the Court of Appeals

On petitions for review, the court of appeals unanimously affirmed the Commission's ruling (Pet. App. 1a-68a). With respect to the networks' assertion that Section 312(a)(7) merely "codified" the Commission's prior "public interest" policy, the court held (Pet. App. 14a):

> Our study of the plain language of Section 312 (a)(7) and our review of the legislative history of the provision leads us to conclude that Section 312(a)(7) *did not* merely codify prior FCC policy and that it *did* create a new right of affirmative access for candidates to federal elective office.

The court explained (*id.* at 15a) that the literal text of the statute "speaks in terms of individual candidates—'*a* legally qualified candidate' seeking time to advocate '*his* candidacy.' By contrast, the Commission's policy before Section 312(a)(7) gave no attention to individual candidates." This change in focus demonstrates that "Congress was doing something different in [Section 312(a)(7)] and supports the view that the legislators were creating a new right for individual candidates when they passed that provision" (*id.* at 16a; footnote omitted).

The court of appeals also held that, in implementing Section 312(a)(7), the Commission "articulated reasonable standards designed to minimize governmental intrusion into broadcasting and to maximize respect for the editorial discretion of broadcasters, while at the same time advancing the important statutory purpose of candidate access" (Pet. App. 54a). The court rejected the argument that determination by the Commission of when statutory obligations attach, *i.e.*, when broadcasters must begin affording

reasonable access, was improper (*id.* at 24a-29a). It held that "determination of when statutory obligations attach is not an editorial decision * * * [but rather] is purely a legal judgment * * * for which the Commission is better suited than either broadcasters or candidates" (*id.* at 28a-29a). Similarly, the court found no basis for the contention that, in making this decision, the Commission impermissibly involved itself in the election process. It noted that "[t]his would be true only if the Commission sought to *set a starting date* for the campaign, rather than merely *find* that it ha[d] *already begun*" (*id.* at 27a). The court added that "[b]y confining the applicability of Section 312(a)(7) to a period when the campaign is fully under way, the Commission has limited the statute's impact on broadcasters" (Pet. App. 29a).

The court of appeals also reviewed the Commission's requirement that broadcasters consider the individual requests of candidates, and concluded that this requirement comported with the rule of reason prescribed by Congress in Section 312(a)(7) (Pet. App. 32a-41a). Applying this requirement, the court agreed with the Commission that the networks had failed to consider the particular request for air time made by the Committee. The court held (*id.* at 39a-40a) that all three networks had "displayed unreasonable disregard for the relevant standards * * * [in adopting] across-the-board policies [which] violated the longstanding mandate of the Commission that, in addressing a request for access from a candidate for federal office, the broadcaster ha[s] to tailor his response to the *individual* candidate."

Finally, the court of appeals found no basis for the contention that Section 312(a)(7), as implemented by the Commission, unconstitutionally re-

stricts the editorial discretion of broadcasters (Pet. App. 42a-47a). The court noted that Section 312 (a) (7) applies only to a narrow and clearly defined class of beneficiaries—legally qualified candidates for federal elective office. Moreover, the statute grants access only for the prescribed purpose of advocating the candidate's election to office, and statutory obligations apply only during the political season when the campaign is fully underway. The court also noted that the Commission has articulated standards to assist broadcasters in determining which requests for access should be honored, and has limited its review to a consideration of whether broadcasters reasonably have applied those standards (*id.* at 46a). In conclusion, the court of appeals emphasized (Pet. App. 46a-47a; footnote omitted):

> The right of "use" granted to the candidate under section 312(a)(7) does not confer on the candidate any right to interfere with what the broadcast journalist says or does on the air. Similarly, the broadcast journalist may not determine what the candidate says or does with the limited amount of air time available to him. Therefore, Section 312(a)(7) represents only a congressional reallocation of the "use" of portions of the airwaves from the licensee to the candidate. The broadcaster's exercise of journalistic discretion—his right to speak and editorialize—is unimpaired.

In a concurring opinion, Judge Tamm warned against applying the statute to "favor[] one speaker or viewpoint over another" (Pet. App. 67a). Having pointed out the need to avoid that danger, Judge Tamm agreed that the statute, as implemented by the Commission, was fully consistent with constitutional requirements. Judge Tamm reached that conclusion

because "section 312(a)(7) makes a tremendous positive contribution to the cause of freedom of expression" (Pet. App. 65a), because "we dare not forget that there is also a potential for evil in leaving the question of access in the hands of private broadcasting interests" (*id.* at 65a-66a), and because "the Commission's standards for implementing section 312(a)(7), as long as they are carefully followed, are sufficient to save the statute from constitutional infirmity" (*id.* at 67a).

SUMMARY OF ARGUMENT

I.

The affirmative access provision prescribed by Congress in 1972, 47 U.S.C. 312(a)(7), imposes on broadcasters a duty to afford "reasonable amounts of time" to "a legally qualified candidate" for federal elective office, who seeks "use of a broadcasting station" to advocate "his candidacy." Repeated failure to afford reasonable access to such a candidate—or even a single episode of willful withholding—subjects the broadcaster to sanctions. The literal terms of the statute leave no room to doubt that Congress intended to protect individual candidates against unreasonable denials of air time. Congress' focus on "a" candidate, seeking the "use" of "a broadcasting station" to advocate "his candidacy," shows plainly that individual candidates were intended to have legally protected rights. This new statutory obligation differs markedly from the Commission's prior "public interest" policy, which merely required broadcasters to make some time available for political programming, and which offered no protection of any kind to individual candidates.

Construing the statute literally to afford affirmative rights to individual candidates involves no break

with historical tradition. Since the inception of radio regulation in 1927, Congress has treated political broadcasting on a special basis. Individual candidates traditionally have enjoyed the right to "use" broadcast stations to reply to their rivals. Broadcasters never have had editorial control over the format or content of such political broadcasts. Furthermore, the general "public interest" obligation always has required broadcasters to offer some political programming, notwithstanding their contrary wishes. The obligation created by Section 312(a)(7) is a natural outgrowth of that requirement.

Events preceding the enactment of Section 312 (a)(7) demonstrate clearly that Congress intended to expand candidate access to the airwaves. Between 1960 and 1971, numerous bills were proposed in Congress that sought to alter the status quo and give candidates a greater opportunity to broadcast their views. And when, in 1972, Congress enacted Section 312(a)(7), it unambiguously stated the objective: to "give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters." S. Rep. No. 92-96, 92d Cong., 1st Sess. 20 (1971). Far from contradicting the literal terms of the statute, the legislative history shows that Congress intended to expand candidate access to broadcast stations and that it understood that it was vesting individual candidates with affirmative access rights.

Following its enactment, the Commission consistently has interpreted Section 312(a)(7) to superimpose upon the general "public interest" requirement a new obligation, which vests rights in individual candidates. That consistent administrative interpretation is entitled to substantial judicial deference under

familiar principles. Moreover, the Commission's views have been explained to Congress and approved by the Senate Subcommittee responsible for communications. Congress has considered complaints from broadcasters about the operation of Section 312(a)(7), but has declined to amend the statute or to disturb the administrative contruction. Accordingly, deference to the agency's view is "particularly appropriate" because the "agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

Although the networks rely heavily on this Court's decision in *CBS, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-114 n.12 (1973), that case did not consider or decide the question presented in this case. In the course of its opinion, the Court had occasion to contrast the treatment afforded political candidates and private citizens under the Communications Act. In pointing out the differences between the access granted to candidates and private citizens, it referred to Section 312(a)(7) and stated generally that it "essentially" codified prior law. The Court did *not* state or imply that the new statute was in all respects coextensive with prior doctrine, or that it imposed no new duties or obligations.

II.

The Commission correctly determined that the networks denied reasonable access in this case. Contrary to legal requirements clearly set forth in the Commission's earlier rulings under Section 312(a)(7), the networks simply applied blanket, preconceived policies and dismissed out of hand the candidate's request for one half-hour of time during December 1979. The networks afforded the request no

individualized attention, and made no attempt to accommodate the stated requirements of the candidate. Moreover, the business justifications offered by the networks for their withholding lacked any factual basis. As the Commission expressly found, there was no realistic possibility of a large number of requests for equal time if the candidate's request was honored, and no claim of program disruption could logically be predicated upon a request for air time made two months in advance, which specified four alternative days.

The Commission has reasonably exercised its authority to interpret the statute and prescribe conditions for its application by determining that access rights do not vest until the campaign is fully underway. That interpretation benefits broadcasters. In the absence of such a limiting interpretation, the statute would apply whenever a legally qualified candidate demanded reasonable access. In determining when a campaign is fully underway, the Commission renders a legal judgment based on objective facts. It does not review the contents of any program or exercise an "editorial" function. Nor does it trigger the onset of the campaign; to the contrary, the Commission's determination is triggered by the existence of substantial campaign activities, as evidenced by objective, extrinsic facts.

The Commission did not exceed its authority by requiring broadcasters to consider the individual requests of candidates. The Commission has not insisted that broadcasters attempt to second-guess the requests of candidates, or pass judgment on the wisdom of their media strategy. Rather, it has required broadcasters to consider the stated requests of candidates and attempt, in good faith, to accommodate those requests with their own business concerns. This

requirement is aimed essentially at the situation presented in this case—in which the broadcasters dismissed out of hand the candidate's request based on preconceived, blanket policies. Such an approach, if condoned, would permit broadcasters to decide unilaterally what may be said by candidates and when, without attention to the particular media strategy candidates believe to be best adapted to reaching their intended audience.

III.

As Judge Tamm observed (Pet. App. 65a), Section 312(a)(7), as interpreted by the Commission, "makes a tremendous positive contribution to the cause of freedom of expression." It facilitates the First Amendment right of each candidate "tirelessly to advocate his own election." *Buckley* v. *Valeo*, 424 U.S. 1, 52 (1976). And it implements the First Amendment right of voters in the viewing and listening audience to receive information necessary "to make informed choices among candidates for office." *Id.* at 14-15. In the broadcast context, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). That principle has particularly great relevance in a case such as this, which involves the right of viewers and listeners to obtain information that is essential to the proper functioning of representative government.

In enacting Section 312(a)(7), Congress balanced the First Amendment rights of candidates, voters, and broadcasters. And it arrived at a fair accommodation —it prescribed a right of "reasonable access." The enactment reflects the well-established legal principle that broadcasters have no First Amendment right to "monopolize a radio frequency" to the exclusion of

political candidates (*Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 389). Congress may require a licensee to "share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which * * * otherwise, by necessity, [would] be barred from the airwaves" (*ibid.*). These principles strongly confirm the constitutionality of Section 312(a)(7), as construed by the Commission, which temporarily reallocates the "use" of the frequency from the broadcaster to the candidate.

The facts of this case show that the Commission paid appropriate deference to the discretion of the networks. It did not second-guess any attempt to accommodate the needs of the candidate and it did not reject any claim of business necessity resting on a valid factual basis. It merely determined that the conduct of the networks was unreasonable, since they ignored the stated request of the candidate and offered no tenable justification for their denial of access. Despite this conduct, which contravened the Commission's long-standing interpretation of Section 312(a)(7), the Commission imposed no sanctions. It merely directed the networks to state how they would comply with the statute. The Commission has thus applied the statute with sensitivity and restraint, and there is no basis for speculating that it will do otherwise in the future.

ARGUMENT

I. SECTION 312(a)(7) OF THE COMMUNICATIONS ACT IMPOSED ON BROADCASTERS A NEW OBLIGATION TO AFFORD REASONABLE ACCESS TO INDIVIDUAL CANDIDATES SEEKING FEDERAL ELECTIVE OFFICE

Petitioners CBS and NBC contend that Section 312 (a) (7) merely codified policies developed by the Commission under the public interest standard of the Communications Act prior to 1971, and that it did not impose any additional obligations on broadcasters (CBS Br. 14-34; NBC Br. 37-49).[7] The plain language of the statute, however, clearly shows that Congress fashioned a new right of access for individual candidates seeking reasonable amounts of broadcast time. Although it is unnecessary to look beyond the statutory text to affirm the Commission and the court of appeals in this case, we also demonstrate below that their interpretation is supported by the structure of the statute and its legislative history, as well as the Federal Communications Commission's consistent administrative construction.

A. The Language of Section 312(a)(7) is Unambiguous

In response to the networks' arguments about the intended scope of Section 312(a) (7), we submit that "this is a case in which the meaning of [the] statute may be determined by the admittedly old-fashioned but nonetheless still entirely appropriate 'plain meaning' canon of statutory construction." *United States* v. *Clarke*, 445 U.S. 253, 254 (1980). Giving the

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[7] ABC appears to take a different view. See ABC Pet. 7: "Section 312(a) (7) confers on federal candidates a certain limited right to broadcast time that licensees are obligated to honor. This petition does not challenge that obligation." See also Pet. App. 22a.

words used by Congress "their ordinary, contemporary, common meaning" (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)), there can be no doubt that Congress imposed on broadcasters an obligation to grant individual candidates for federal office a right of reasonable access.[8]

Section 312(a)(7) authorizes the Commission to impose the sanction of license revocation based on a broadcaster's willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time "for the *use* of *a broadcasting station* by *a legally qualified candidate* for Federal elective office *on behalf of his candidacy*" (emphasis supplied). Congress did not prescribe a duty merely to provide some measure of political programming in general. Congress focused on the individual candidate: "*a* legally qualified candidate" is given a right, enforceable by government sanction, to a specific "use" of "*a* broadcasting station" to advocate "*his* candidacy."[9]

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[8] While the briefs of the networks dwell at great length on legislative history, they fail to come to grips with the literal language of the statute itself. That approach ignores this Court's repeated admonition that "'[t]he starting point in every case involving construction of a statute is the language itself.'" *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 558 (1979) (citations omitted). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *CPSC* v. *GTE Sylvania*, No. 79-521 (June 9, 1980), slip op. 5. See also *Harrison* v. *PPG Industries*, No. 78-1918 (May 27, 1980) slip op. 13; *Rubin* v. *United States*, No. 79-1013 (Jan. 21, 1981), slip op. 6.

[9] In the present case, the Commission ruled on the candidate's complaint alleging a violation of Section 312(a)(7). The Commission's adjudication of individual complaints and

Applying these statutory terms literally, it follows that the Commission may impose the sanction of revocation based on a single episode of "willful" failure to afford a reasonable amount of air time to a candidate. And, if an unreasonable denial of air time is "repeated"—that is, it occurs more than once—the sanction of revocation may be imposed even in the absence of a showing of willfulness. In short, the statute focuses not only on the individual candidate, but also authorizes the Commission to impose sanctions even in the case of a single instance of willful withholding.[10]

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its issuance of orders is in aid of its ultimate authority to impose sanctions under Section 312(a)(7)—if sanctions should prove to be necessary—and is consistent with its express authority to issue orders and prescribe conditions reasonably necessary to enforce the statute. See 47 U.S.C. 154(i), (j), 303(r); 47 C.F.R. 1.2, 1.89. See also *FCC* v. *WJR*, 337 U.S. 265, 282 (1949); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 372 n.3 (1969); *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 730 (1978). Broadcasters have urged the Commission to act upon individual complaints in this manner rather than awaiting renewal or revocation hearings. See *Fairness Report*, 48 F.C.C.2d 1, 18 (1974), reconsideration denied, 58 F.C.C.2d 691 (1976), aff'd in relevant part, *National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095, 1115-1116 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978).

[10] We do not suggest that the Commission should exercise its authority to impose sanctions based on relatively isolated or good faith violations of the statute. Indeed, the Commission never has imposed sanctions on any broadcaster based on a violation of Section 312(a)(7). As discussed on pages 66-69, *infra*, the Commission has taken effective steps to minimize the need for sanctions in this area. In this case, for example, the Commission encouraged the parties to negotiate their differences after it reiterated the applicable legal standards (Pet. App. 101a & n.34). Moreover, after finding a violation, it merely directed the networks to advise it of what steps they would take to assure compliance (*id.* at 142a).

This specific statutory duty stands in marked contrast to the broadcaster's more limited duty under the general "public interest" policy. Under that policy, broadcasters wishing to assure renewal of their licenses were expected, among other things, to make judgments about the importance of particular campaigns, and, on that basis, to decide which campaigns and which candidates should be given air time. The requirement was that *some* time be given to political broadcasting, but no individual candidate could claim a personal right of access in the absence of a broadcast by his rival, and no distinction was drawn between local, state, and federal elections.[11] In sum, unlike the general public interest policy, the express terms of Section 312(a)(7) prescribe special access rights for individual candidates.[12]

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[11] See *Enbanc Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960); *Memorandum Concerning Interpretation of Second Sentence of Section 315(a)*, 40 F.C.C. 1088, 1093-1095 (1963); *Lew Breyer*, 31 F.C.C.2d 548 (1968); *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 535-538 (1972); *1978 Report and Order*, *supra*, 68 F.C.C.2d at 1088. As summarized in the Commission's *New Primer on Political Broadcasting & Cablecasting*, 69 F.C.C.2d 2209, 2286 (1978), Section 312(a)(7) "does require [broadcasters] to permit [reasonable] access to all candidates for Federal office if the candidates request it." The public interest standard, in contrast, permits broadcasters to "use [their] judgment as to which races are most significant and of greatest interest to the public, and refuse to sell or give time for 'uses' of the station by candidates for other offices." *Id.* at 2290 (footnote omitted).

[12] The candidate's right to protection against unreasonable denials of air time is the converse of the broadcaster's duty, upon pain of government sanction, to afford reasonable access to individual candidates. The candidate enforces the right through the ordinary process of filing a complaint with

The plain terms of the statute further demonstrate that Congress was not simply codifying the prior "public interest" standard because the statute applies only to candidates seeking "Federal elective office." The public interest standard, in contrast, applied to candidates for *all* offices, and continues to govern broadcaster obligations with respect to state and local candidates. See *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d at 2290. If Congress had intended merely to codify the preexisting public interest obligation, there would have been no need to limit the statute to federal candidates; indeed, such a limitation would be inexplicable.[13] Thus, as the court of appeals pointed out (Pet. App. 16a), the plain terms of the statute show that "candidates in *federal* elections were being singled out for something beyond the amorphous right of access created by the public interest doctrine."

B. The Statutory Scheme and Legislative History Support a Literal Interpretation of Section 312(a)(7)

While the literal terms of Section 312(a)(7) are so unambiguous as to suggest that "further inquiry may be unnecessary" (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976)), an examination of the statutory scheme and the legislative history strongly

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the Commission. See *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d at 2212-2215.

[13] Congress did not extend the new obligation prescribed under Section 312(a)(7) to state and local candidates because an individual right of access vested in those candidates, as well as federal candidates, would have placed impractical burdens on broadcasters. See *Political Broadcasting—1970: Hearings on H.R. 13721, S. 3637 and Others Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 23 (1970).

reinforces the literal interpretation adopted by the Commission and the court of appeals in this case.

1. In enacting Section 312(a)(7) in 1972 to prescribe a right of access for individual federal candidates, Congress did not write on a clean slate. From the very beginning of the regulation of radio and television, Congress has regulated "uses" of the airwaves by political candidates under a regime that differs from that applicable to broadcaster presentations of public issues. As discussed on pages 22-23, *supra*, the "public interest" standard has long imposed on broadcasters a duty to provide access to some candidates for political uses. And, since the enactment of Section 18 of the Radio Act in 1927, ch. 169, 44 Stat. 1170, Congress has required broadcasters to provide an equal opportunity of reply to candidates after their rivals make public appearances over the airwaves. The equal opportunity doctrine, which today is codified in 47 U.S.C. 315(a), has always imposed on broadcasters a special duty to carry political programming regardless of their editorial views and with no censorship of the contents of the programming allocated to political candidates. Thus, Congress has prescribed that, in the field of political programming, the candidate—and not the broadcaster—would be the ultimate judge of program content.[14]

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[14] See *Farmers Union* v. *WDAY*, 360 U.S. 525, 527-531 (1959). The right of candidates to be the ultimate judge of what is presented was intended to be a safeguard against abuses of editorial control by broadcasters. See *id.* at 529-530. In thus divesting broadcasters of their usual editorial control in the context of political broadcasting, Congress fully recognized that it was imposing special obligations on them. See *Memorandum Concerning Interpretation of Second Sentence of Section 315(a)*, *supra*, 40 F.C.C. at 1090 (discussing the legislative history).

The distinct treatment afforded to political broadcasting is highlighted by the fact that, both in 1927 and 1934, Congress specifically considered but firmly rejected suggestions that the equal opportunity requirement be extended to cover general public issue programming as well as political broadcasts by candidates. See 67 Cong. Rec. 12501-12505 (1926); H.R. Conf. Rep. No. 1918, 73d Cong. 2d Sess. 49 (1934); see also *CBS, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 104-108 (1972).[15]

Thus, the pertinent feature of the historical background, against which Section 312(a)(7) was enacted, is Congress' different treatment of general broadcasting and political broadcasting. In contrast to general programming, political programming al-

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[15] Events following the adoption of the 1934 Act also illustrate the distinctive treatment afforded to political broadcasting. In 1952, Congress adopted a provision restricting the rates that broadcasters could charge political candidates. Act of July 16, 1952, ch. 879, Section 11, 66 Stat. 717 (amended by Federal Election Campaign Act of 1971, Pub. L. No. 92-225, Section 103(a)(1), 86 Stat. 4). In 1959, it acted promptly to correct what it viewed as a misinterpretation of the equal opportunities provision. See *Political Broadcasting: Hearings on S. 1585, S. 1604, S. 1858 and S. 1929 Before the Subcomm. on Communications of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st. Sess. 1-2 (1959). On that occasion, when it adopted four exemptions to Section 315 for news-type programs (see 47 U.S.C. 315(a)), Congress declared its intent to review regularly the operation of Section 315 and required annual Commission reports on the application of the statute as amended. Communications Act Amendment of 1959, Pub. L. No. 86-274, Section 2, 73 Stat. 557. There is no other area of broadcast programming over which Congress has exercised such thorough oversight and has so pervasively regulated broadcaster discretion.

ways has been surrounded with special statutory obligations. Under Section 315 and its predecessor, broadcasters have been required, upon request, to provide rival candidates with specific amounts of time with *no* control over program content or format. Congress, therefore, rather than the licensee, has allocated a substantial portion of the broadcast frequency for political "uses." In this context, the prescription of a duty to afford "reasonable access" to individual federal candidates was not a dramatic change in statutory policy. Section 312(a)(7) represented only a limited extension of the contingent right of access that Congress traditionally provided for individual political candidates. It also represented a natural evolution of the previously recognized "public interest" requirement, which compelled broadcasters to make some program time available in the first instance for political candidates.[16]

2. The Commission's literal interpretation of Section 312(a)(7) is confirmed not only by the historic approach of Congress to political programming, as discussed above, but also by the events that preceded enactment of Section 312(a)(7). Section 312(a)(7)

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[16] In reliance on 47 U.S.C. 153(h), petitioners argue that they should not be deemed to be "common carriers." See ABC Br. 31 n.39; CBS Br. 17-19; NBC Br. 31. We agree that they are not common carriers for the general public. They are, however, "special carriers" for political programming under prescribed circumstances, and have been so ever since 1927. Under Section 18 of the Radio Act of 1927, ch. 169, 44 Stat. 1170, and Section 315 of the Communications Act, 47 U.S.C. 315, Congress has required broadcasters to relinquish "uses" of their stations for political replies, has deprived broadcasters of editorial control over those broadcasts, and has regulated the rates they may charge.

represented the culmination of a legislative process covering more than a decade. Following the 1959 amendments to Section 315 of the Act (see note 15, *supra*), demands mounted in Congress for increased media access for political candidates. In 1960, a bill was introduced in the Senate that would have required television stations to make specific amounts of free time available to presidential candidates. S. 3171, 86th Cong., 2d Sess. (1960). During hearings on that bill, Senator Pastore expressed disapproval of the policies of some stations that had refused requests for political time. *Presidential Campaign Broadcasting Act: Hearings on S. 3171 Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 59-60 (1960). Subsequent hearings also focused on the Commission's inability to protect individual candidates seeking access. See *Political Broadcasting: Hearings on S. 204 and others Before the Communications Subcomm. of the Senate Comm. on Commerce*, 87th Cong., 2d Sess. 141-146 (1962) (remarks of Chairman Minow) ("we do not presently have authority to say to a station 'you must put on candidate X' "). Once again, in 1967, a bill that would have required free access time for state and local, as well as federal candidates, was proposed. S. 1548, 90th Cong., 1st Sess. (1967). See *Projections—Predictions of Election Results and Political Broadcasting (Sec. 315, Communications Act): Hearings on S. 1548 and others Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 174-175 (1967). When that attempt to fashion increased access rights failed, thirty-eight Senators co-sponsored another bill (S. 2876, 91st Cong., 1st Sess. (1969)), which would have required that specific amounts of television time be sold to Congressional candidates at discount rates. See *Cam-*

paign Broadcast Reform Act of 1969: Hearings on S. 2876 and Others Before the Communications Subcomm. of the Senate Comm. on Commerce, 91st Cong., 1st Sess. 4-9 (1969); see also *id.* at 47-50 (remarks of Chairman Hyde). In 1970, both houses of Congress passed S. 3637, 91st Cong., 2d Sess. (1970), a bill which, *inter alia*, would have regulated expenditures for political broadcasts. As amended on the floor of the Senate (116 Cong. Rec. 11593 (1970)), S. 3637 would have declared that "consistent with the other needs of the community broadcast licensees shall make a reasonable amount of time available for legally qualified candidates for federal elective office between the hours of 7:30 and 10:30 [P.M.]."

This bill was subsequently vetoed by the President (S. Doc. No. 91-109, 91st Cong., 2d Sess. (1970)). The subject of campaign reform was again taken up, however, in 1971. Three bills were introduced in the Senate—S. 1, S. 382, and S. 956—measures, which, in different ways, were "intended to increase a candidate's accessibility to the media * * *." *Federal Election Campaign Act of 1971: Hearings on S. 1, S. 382, and S. 956 Before the Senate Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 2 (1971) (remarks of Senator Pastore). S. 1 would have required each broadcaster to "make available without charge the use of its facilities * * * to candidates in a presidential election for the offices of President and Vice President * * *" S. 1, 92d Cong., 1st Sess. § 202 (1971). Certain candidates would have received free of charge "eight one-half hour periods of prime time from each such station and network * * *." *Ibid.* S. 956, by contrast, would have granted the Commission a broad power to issue rules "to insure that all licensees make available to legally qualified candidates for public office reasonable amounts of time for use of broadcasting

stations * * *." S. 956, 92d Cong., 1st Sess. § 302 (1971).

Rather than adopting either S. 956 or S. 1, however, the Senate Commerce Committee and Rules and Administration Committee approved S. 382, but inserted within it the language appearing today in Section 312(a)(7).[17] As discussed on pages 19-23, *supra*, the language deliberately chosen by Congress prescribed a new obligation requiring broadcasters to provide federal candidates with reasonable access to the airwaves. In contrast to some of the bills previously considered by Congress (see pages 27-28, *supra*), the language ultimately selected left no doubt concerning the legislative intent to protect *individual* candidates.[18]

3. Although the contemporaneous commentary on Section 312(a)(7) in the legislative history is limited, that commentary also supports the view that Congress sought to prescribe a new affirmative right of access for candidates seeking federal elective office. In summarizing one of the leading purposes of Title I of the new statute—the title which contained Section 312(a)(7)—Congress stated that it (emphasis supplied):

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[17] As reported in the Senate, the text of the new access provision was sweeping. It applied to "any legally qualified candidate on behalf of his candidacy." S. Conf. Rep. No. 92-580, 92d Cong., 1st Sess. 22 (1971); S. Rep. No. 92-96, 92d Cong., 1st Sess. 3 (1971); S. Rep. No. 92-229, 92d Cong., 1st Sess. 5 (1971). The Conference Committee limited the provision only in one respect—by confining it to candidates seeking *federal* elective office. S. Conf. Rep. No. 92-580, *supra*, at 22.

[18] Section 312(a)(7) was enacted as part of Title I of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3.

> attempts to give candidates for public office *greater access to the media* so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters.

S. Rep. No. 92-96, *supra*, at 20. The Committee plainly was referring to Section 312(a)(7) when it recited the statutory purpose of affording "greater access to the media" for political candidates. The correlation between that purpose and the plain text of Section 312(a)(7) is, we submit, obvious and compelling.[19]

Subsequent portions of S. Rep. No. 92-96 further establish that Congress understood that it was superimposing a new obligation on the prior "public interest" requirement. The Senate Report separately describes the newly prescribed obligation,[20] and dis-

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[19] Petitioners assert that, because Section 312(a)(7) was not specifically mentioned in conjunction with this statement of purpose, and other portions of the statute were discussed by the Committee shortly thereafter, it necessarily follows that the statement of purpose has no relationship to Section 312(a)(7). However, the short summary of statutory provisions appearing on page 21 of the Senate Report obviously is not exhaustive. The Report's subsequent, more detailed summary of the provisions in Title I includes repeated references to Section 312(a)(7). See S. Rep. No. 92-96, *supra*, at 34, 38.

[20] The Report states (*id.* at 34):

> [The new Section 312(a)(7)] provide[s] that willful or repeated failure by a broadcast licensee to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a legally qualified candidate for Federal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.

Section 312(a)(7) sought to "emphasize" (*id.* at 28) the duty to afford access to federal candidates by focusing on them individually, rather than generally. Vesting candidates with

tinguishes it from the "general" public interest requirement.[21] Moreover, during floor debates on the Conference Report that was submitted to the House, it also was recognized that the new Section 312(a)(7) imposed significant new obligations on broadcasters and afforded rights to individual candidates. See 118 Cong. Rec. 326 (1972) (remarks of Rep. Keith).

The final, and in our view conclusive, piece of evidence of legislative intent appears in Congress' contemporaneous amendment of Section 315(a) of the Act, 47 U.S.C. 315(a). That amendment was described by the Senate Conference Committee as "a conforming amendment" required by the enactment of the new Section 312(a)(7). See S. Conf. Rep. No. 92-580, *supra*, at 22; accord, H.R. Conf. Rep. No. 92-752, 92d Cong., 1st Sess. 22 (1971). The text of Section 315(a), prior to the "conforming amendment," was as follows (47 U.S.C. (1970 ed.) 315(a)):

> No obligation is imposed upon any licensee to allow the use of its station by any such candidate.

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individual rights directly served the statutory purpose to "enable *all* who seek such office to have a *better* opportunity to do so" (*id.* at 26; emphasis added).

[21] The Report gives separate treatment to the general public interest obligation previously recognized by the Commission (S. Rep. No. 92-96, *supra*, at 34):

> The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the [community] of license. The Federal Communications Commission has recognized this obligation * * *.

Congress intended that this "general" public interest requirement would "continue" to be enforced at three year intervals in the license "renewal" context, not in license revocation proceedings (*id.* at 28).

As a result of the conforming amendment, however, Section 315(a) now contains an important qualification (47 U.S.C. 315(a) (emphasis supplied)):

> No obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate.

It was necessary for Congress to qualify its statement that there was "no obligation" to afford individual access—and to make it clear that that statement applied only under Section 315(a)—precisely because the newly enacted Section 312(a)(7) *does* require broadcasters to afford individual access. In short, as the court of appeals explained (Pet. App. 18a), "[i]f Section 312(a)(7) was merely intended to codify pre-existing obligations and add the sanction of revocation, no 'conforming amendment' to Section 315 would have been required." [22]

Thus, far from contradicting the literal terms of Section 312(a)(7), the legislative history provides additional support for the literal interpretation adopted by the Commission and the court of appeals.

C. The Commission's Consistent Administrative Construction, Which Has Been Brought to the Attention of Congress, Confirms the Appropriateness of a Literal Interpretation of Section 312(a)(7)

As this Court frequently has held, the construction of a statute by those charged with its administration "should be followed unless there are compelling indi-

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[22] The networks suggest (CBS Br. 30 n.70; NBC Br. 45 n.*) that Congress merely intended its amendment of Section 315(a) to restore certain language appearing in the Statutes at Large, but omitted from the United States Code. That theory, however, has virtually no support in the legislative history, and is contradicted by Congress' explicit statement that the amendment was a "conforming" amendment needed to bring Section 315(a) into harmony with the newly enacted Section 312(a)(7).

cations that it is wrong, especially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *CBS, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 121-123, 125, (1973); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565-566, 568 (1980). Deference to the agency's interpretation "is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979). These settled principles of statutory construction reinforce the view that Section 312(a)(7) created a new right of individual access for federal candidates.

Immediately following the enactment of Section 312(a)(7), and up until the present time, the Commission consistently has construed the statute to impose a new obligation on broadcasters to afford access to individual federal candidates. The Commission repeatedly has determined that this obligation extends beyond the prior public interest policy. See *Use of Broadcast & Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 535-538 (1972) (*"1972 Policy Statement"*); *Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 F.C.C.2d 516-517 (1974) (*"1974 Public Notice"*); *1978 Report and Order, supra*, 68 F.C.C. 2d at 1088; *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d at 2286, 2290.[23]

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[23] It is difficult to understand the basis for the networks' attempt to fault the Commission (ABC Br. 33-37; CBS Br. 32-34) for inconsistency in construing the statute. In its first published statement about the statute, the Commission made it clear that Section 312(a)(7) imposes a new "specific re-

The Commission's interpretation has been brought to the attention of Congress and has been discussed with approval by Senator Pastore, the Chairman of the Communications Subcommittee of the Senate Commerce Committee.[24] In 1973, the Senate Subcommittee on Communications held hearings to review the operation of the Federal Election Campaign Act of 1971. See *Federal Election Campaign Act of 1973: Hearings on S. 372 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. (1973) (*"Hearings on S. 372"*). As the court of appeals pointed out (Pet. App. 19a), Commission Chairman Dean Burch testified concerning the Commission's experience with Section 312(a)(7) and supplied the Committee with its *1972 Policy Statement*, which had construed the statute "to impose[] on the overall obligation to operate in the public interest the additional specific requirement that reasonable access and purchase of reasonable amounts of time be afforded candidates for Federal office." See 34 F.C.C.2d at 538; *Hearings on S. 372*,

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quirement" on broadcasters in addition to the general "public interest" obligation and that blanket refusals to sell time to candidates could not be countenanced. *1972 Policy Statement*, *supra*, 34 F.C.C.2d at 538. The Commission reiterated this position in the *1974 Public Notice*, *supra*, 47 F.C.C. 2d at 516-517, and in the *1978 Report and Order*, *supra*, 68 F.C.C.2d at 1088. The Commission's rulings on individual complaints have adhered to the same view of the statute from the beginning. See, *e.g.*, *Robert H. Hauslein*, 39 F.C.C.2d 1064, 1065 (Broadcast Bureau 1973); *Summa Corp.*, 43 F.C.C.2d 602, 603-605 (1973); *Don C. Smith*, 49 F.C.C.2d 678, 679-680 (Broadcast Bureau 1974); *Ken Bauder*, 62 F.C.C.2d 849 (Broadcast Bureau 1976); *Labor Party*, 67 F.C.C.2d 589 (1978).

[24] Senator Pastore presided since 1959 over all of the Communications Subcommittee Hearings dealing with candidate access bills and was floor manager of the Federal Election Campaign Act of 1971 (see pages 27-28, *supra*).

supra, at 137. Chairman Burch also discussed in detail the practical problems implicit in attempting to decide whether, in a particular case, an individual station has afforded reasonable access to a particular candidate. *Hearings on S. 372, supra*, at 137. After advising the Subcommittee of the Commission's interpretation of the statute and its experience in applying it, Chairman Burch stated: "We have brought our approach to these problems in the form of the 1972 Public Notice to the attention of Congress. If we have erred in some important construction, we would, of course, welcome congressional guidance." *Ibid.* Senator Pastore replied (*ibid.*):

> Let me say this. We didn't draw the provision any differently than we did because when you begin to legislate on guidelines, and on standards, and on criteria, you know what you run up against. I think what we did was reasonable enough, and I think what you did was reasonable enough as well.
>
> I know it is a difficult problem to say what is reasonable. You have to take everything into consideration. You couldn't cancel all other programs that the public might be interested in, just to accommodate all the candidates.
>
> Yet, on the other hand, there is the question of giving sufficient time. In some instances, especially since there is a lowest unit rate, some licensees have been rather reluctant to give adequate time.
>
> I would suppose that in cases of that kind, you would get some complaints.[25]

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[25] While the Commission and Senator Pastore expressed their satisfaction with the operation of the new access provision, network officials complained about its intrusive effect. CBS Vice Chairman Frank Stanton objected to the fact that "section 312 grants rights to all legally qualified candidates for Federal office * * *." *Id.* at 190. Despite the complaints

Congress revisited the subject of federal election campaign reform in 1974. The Federal Election Campaign Act Amendments of 1974, among other things, repealed the expenditure limitations prescribed in Title I of the 1971 legislation. See Pub. L. No. 93-443, Section 205(b), 88 Stat. 1278. Although Section 312(a)(7) also had been enacted as part of Title I, it was not altered by Congress and the administrative construction of the statute was left undisturbed.[26]

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of broadcasters, the Senate Commerce Committee approved the Commission's administration of Section 312(a)(7). Chairman Burch assured the Committee that the Commission would continue to consider "complaints on an *ad hoc* basis as actual cases arise." The Committee stated: "Your Committee believes that testimony submitted for the record by the Chairman of the FCC should allay any fears that the provisions of section 312(a)(7) might work a hardship on a good faith licensee or otherwise adversely surprise him." S. Rep. No. 93-170, 93d Cong., 1st Sess. 6-7 (1973). See also *id.* at 7-8. Network officials continued in subsequent years to object in Congress that Section 312(a)(7) "unduly intrudes" upon editorial discretion. *First Amendment Clarification Act of 1977: Hearings on S. 22 before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation,* 95th Cong., 2d Sess. 67 (1978). Still later, the House Communications Subcommittee was advised of the manner in which the Commission had interpreted Section 312(a)(7) in the instant case and expressed no disapproval. See *Repeal of "Equal Time" Requirements: Hearings on H.R. 6103 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce,* 96th Cong., 2d Sess. 42 (1980). Counsel for the subcommittee agreed with the view that Section 312(a)(7) creates a right of access for *individual* federal candidates. *Id.* at 43.

[26] Since 1974, Congress has considered proposals to repeal Section 312(a)(7), but has declined to change the statute or the administrative interpretation. See S. 1178, 94th Cong., 1st Sess. § 2 (1975), introduced at 121 Cong. Rec. 6446, 6454-6458 (1975), hearings held, *Fairness Doctrine: Hearings on S. 2, S. 608, and S. 1178 Before the Communica-*

In light of the consistent interpretation rendered by the Commission and Congress' continuing oversight of this widely discussed provision, "Congress' failure to repeal or revise" Section 312(a)(7) "in the face of such administrative interpretation [provides] persuasive evidence that that intepretation is the one intended by Congress." *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); accord, *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 381; *United States* v. *Bergh*, 352 U.S. 40, 46-47 (1956); *Andrus* v. *Shell Oil Co.*, No. 78-1815 (June 2, 1980), slip op. 8-13.

D. This Court's Decision in *CBS* v. *Democratic National Committee* Does Not Call Into Question the Commission's Interpretation of Section 312(a)(7)

In support of their view that Section 312(a)(7) did nothing more than merely restate the "public interest" requirement imposed on broadcasters prior to its enactment (see page 22, *supra*), the networks cite (ABC Br. 21-22; CBS Br. 14-15; NBC Br. 37-40) this Court's decision in *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 113-114 n.12. In that case, the Court observed in a footnote discussion that Section 312(a)(7) had "essentially codified" prior Commission policy. Once again, however, the networks misapprehend the meaning of the language in question. The Court in *Democratic National Committee* did *not* say that Section 312(a)(7) imposed no new duties, and it did not imply that

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tions Subcomm. of the Senate Comm. on Commerce, 94th Cong., 1st Sess. (1975); S. 22, 95th Cong, 1st Sess. § 3 (1977), introduced at 123 Cong. Rec. S186-S187 (daily ed. Jan. 10, 1977), 124 Cong. Rec. S8879-S8881 (daily ed. June 8, 1978), hearing held, *First Amendment Clarification Act of 1977: Hearing on S. 22 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 2d Sess. (1978).

Section 312(a)(7) was in all respects coextensive with prior doctrine. The Court said that the statute "essentially" codified prior doctrine,[27] which is correct in the sense that Section 312(a)(7) directly evolved from, was consistent with, and was superimposed upon the predecessor public interest doctrine.

In addition to the fact that this Court qualified its footnote observation as it did, the fact of overriding importance is that the Court was not called upon, and did not purport, to rule on the precise contours of the obligation imposed by Section 312(a)(7). The issue before the Court in *Democratic National Committee* was whether the Communications Act or the First Amendment requires the Commission to force broadcasters to accept paid editorial announcements from the general public. 412 U.S. at 97. The Court held that the Commission need not prescribe such a general access obligation. *Id.* at 121-132. The Court observed "that no private individual or group" has a right to command the use of the airwaves (*id.* at 113), and contrasted that situation with the right of "political candidates" to receive air time (*id.* at 113-114 n.12):

> Very recently, Congress amended § 312(a) of the 1934 Act to authorize the Commission to revoke a station license for "willfull or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." * * * This amendment essentially codified the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates.

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[27] The word "essentially" denotes some correspondence, not an identical relationship. Its synonym is "substantially." See *Oxford English Dictionary* 296 (1933).

Thus, read in context, it is clear that the Court intended merely to contrast the special treatment afforded "political candidates" under the Communications Act with the treatment afforded any "private individual or group." [28] The Court did not attempt to decide the question presented in this case—whether Section 312(a)(7) vests individual candidates with an affirmative right of access.[29]

Finally, even if there were some discrepancy between the Court's discussion of Section 312(a)(7) in *Democratic National Committee* and the literal terms

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[28] As the court of appeals explained, the point of this Court's discussion in *Democratic National Committee* was that "one limited class of speakers, political candidates, has a stronger claim to the airwaves than do citizens at large" (Pet. App. 21a).

[29] In its brief before this Court in *Democratic National Committee* (Br. 42-43 n.37), the Commission also referred to Section 312(a)(7) as a form of codification of the prior public interest standard. However, the point of the Commission's discussion was simply that, with the exception of political programming, Congress has not required broadcasters to serve as common carriers. The Commission's brief did not purport to render an interpretation on the issue now before the Court. Moreover, the relevant statement of administrative views appears in the Commission's formal interpretations, not in appellate briefs dealing with other issues. See *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 627-628 (1971). As previously noted, the Commission's consistent interpretation of the statute—an interpretation beginning in 1972 and continuing to the present day—is that Section 312(a)(7) imposed a new obligation on broadcasters to afford individual access for federal candidates. As CBS recognized in its brief filed in this Court in *Democratic National Committee* (Br. 30-31 n.72), Section 312(a)(7) "represents the first time that Congress has created a specific individual right to purchase broadcast time that does not depend upon a previous use by opposing candidates."

of the provision (as discussed on pages 19-23, *supra*) it is obvious that the plain meaning of the statute would be controlling. As the Chief Justice, writing for the Court in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979), recently observed, "the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." Accordingly, while a paraphrase of the statute was useful for purposes of the Court's discussion in *Democratic National Committee*, there is no substitute for a literal application of the language of Section 312(a)(7) in resolving the question of statutory interpretation presented in this case.[30]

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[30] The networks also argue that, because the Federal Election Campaign Act's general goals included shortening campaigns and reducing their costs, the statute should not be construed literally to vest candidates with individual access rights, particularly in the early phase of a campaign (ABC Br. 23-24; CBS Br. 31; NBC Br. 46-47). However, "if the language of a provision * * * is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." *Aaron* v. *SEC*, No. 79-66 (June 2, 1980), slip op. 14-15. Thus, "generalized references" to the "purposes" of the Act do not warrant a departure from its literal text. In any event, the Commission's interpretation does not conflict with those general purposes. The statute achieves the goal of encouraging shorter campaigns by limiting application of the economically beneficial "lowest unit charge" provision to a relatively short time period. See 66 Stat. 717, as amended, 47 U.S.C. 315(b); S. Rep. No. 92-96, *supra*, at 28. That same provision lowers campaign costs by reducing charges for airtime (to a greater degree than prior law) during the period when most political broadcasts occur. Total campaign expenditures were also controlled by the statute, as originally en-

II. THE COMMISSION'S FINDING THAT THE NETWORKS FAILED TO AFFORD REASONABLE ACCESS IS SUPPORTED BY THE RECORD AND IS NEITHER ARBITRARY NOR CAPRICIOUS

As we have explained above, Section 312(a)(7) prescribed a new obligation, requiring broadcasters "to allow reasonable access to or to permit purchase of reasonable amounts of time" by individual candidates seeking to advocate their candidacies for federal office. Thus, Congress has prescribed a rule of reason and it has charged the Commission with responsibility for enforcing it. Neither candidates seeking time, nor broadcasters opposing their requests, possess final authority in cases of disagreement to declare what is "reasonable." [31]

Like the "public interest" standard enforced by the Commission, the rule of reason prescribed in Section 312(a)(7) imposes on the Commission a duty of interpretation. And Congress has vested the Commission with ample power to render interpretations,

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acted, through expenditure limitations. See Pub. L. No. 92-225, Sections 103-106, 86 Stat. 4-8. See also page 36, *supra*. In sum, there is no support whatsoever for the proposition that Congress intended a cramped construction of Section 312(a)(7) to curtail the length of campaigns or their costs. And there certainly is no indication that Congress meant to vest in the networks unilateral power to truncate federal political campaigns for the ostensible purpose of promoting campaign brevity and economy. See *Buckley* v. *Valeo*, 424 U.S. 1, 57 (1976), noting that "the people—individually as citizens and candidates * * * must retain control over the quantity and range of debate * * * in a political campaign."

[31] As previously noted, the Commission expects that, in the great majority of cases, broadcasters and political candidates, applying the Commission's standards in good faith, will negotiate disagreements about access without Commission intervention.

to prescribe conditions, and to issue orders necessary to enforce the statute. See 47 U.S.C. 154(i), (j), 303(r). The Commission's interpretations under Section 312(a)(7) are entitled to substantial judicial deference unless arbitrary or capricious. *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793-797, 810-811, 814 (1978); *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 380-381; *NBC* v. *United States*, 319 U.S. 190, 216-219, 224-225 (1943); *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946).

The networks do not dispute the Commission's authority to interpret Section 312(a)(7) or to issue orders thereunder (Pet. App. 23a). They do, however, assert that certain of the standards prescribed by the Commission fail to implement statutory objectives and intrude unduly on their discretion (ABC Br. 25-37; CBS Br. 34-40; NBC Br. 17-34). In making these contentions, they must sustain a weighty burden. For, as this Court repeatedly has recognized, the Commission is the expert agency in the field of broadcast regulation, and its views are entitled to great respect by the judiciary. *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 102-103, 122-123, 131-132. Broad discretion in prescribing such standards is essential if the Commission is to "remain in a posture of flexibility to chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." *Id.* at 120. The networks' burden in challenging the Commission's standards is particularly weighty since those standards have been reviewed and approved by a unanimous court of appeals, which found not only that they were not "arbitrary or capricious," but also that "the standards employed in the orders under

review here represent a very reasonable effort at implementing Section 312(a)(7)" (Pet. App. 42a).

1. The Commission's standards establish the ground rules for evaluating requests for access under Section 312(a)(7). In a nutshell, the standards are as follows. Broadcasters enjoy complete discretion to withhold air time prior to the commencement of a campaign. However, once a campaign has commenced, as evidenced by objective factors, broadcasters must give reasonable and good faith attention to requests for air time from candidates for federal elective office. This requires that they consider each request on an individualized basis. Thus, if a candidate wishes to concentrate limited resources for a single half-hour presentation, rather than several five minute presentations, the broadcaster must consider the stated request and attempt to tailor its response as much as possible to accommodate the request. Broadcasters need not, however, ignore their own legitimate concerns. In making their response, they may consider the likelihood of requests for time from rival candidates under Section 315 of the Act and the magnitude of foreseeable program disruption. Broadcasters may not, however, invoke these considerations as pretexts for denying time and serving their own convenience. They must cite a realistic danger of substantial program disruption or of an unduly large number of requests for equal time. Moreover, broadcasters must explain their reasons for denying time or presenting a limited counter-offer, so that the Commission may determine whether they have considered the relevant factors. If, in fact, broadcasters have considered the relevant factors, and have acted reasonably and in good faith, their decision will be approved even if the Commission itself would have analyzed the question differently in the

first instance. But if they simply have adopted "across the board policies," and have not even attempted to respond to the particular request of the candidate, their denial will not be approved. These, in substance, are the relevant guidelines established by the Commission under Section 312(a)(7). See Pet. App. 86a-101a; 123a-139a; *1978 Report and Order, supra*, 68 F.C.C.2d at 1089-1091, 1094. Far from being patently irrational, it is difficult to perceive how a rule of reason analysis in this area could operate without such principles, or their near equivalents.

Applying these principles to the facts of this particular case, the Commission found that the presidential campaign was fully underway in December 1979 (Pet. App. 88a-94a). It further found that NBC and ABC, by dismissing out of hand the President's request and refusing to offer any time, had applied "blanket," preconceived policies and had not made a good faith attempt to tailor their response to the candidate's stated request (*id.* at 91a, 99a, 125a, 128a-129a, 131a-133a, 137a-138a). Likewise, CBS completely ignored the candidate's particular request when it offered only five minutes to carry a previously prepared one-half hour documentary film, intended to comprehensively summarize the President's record over three years (*id.* at 99a-101a, 129a-131a). Thus, the networks' denial of the request for air time rested on a mistaken interpretation of Section 312(a)(7). By enforcing blanket policies, and by refusing to consider the candidate's request on an individual basis, the networks disregarded the statute's requirements as clearly set forth in the Commission's *1978 Report and Order, supra.*

The candidate's request for air time, moreover, entailed no realistic danger of program disruption. The

request was made more than two months before the intended date of broadcast; the requested half hour could be placed in any time slot in prime time over a four day period; the four day period was selected to avoid affecting network ratings; the candidate offered to pay the normal commercial rate; and the candidate had not previously requested time and anticipated no further requests in the foreseeable future (Pet. App. 97a-98a; J.A. 29-33, 204-205). Furthermore, the networks had no reasonable basis for fearing a significant number of requests for equal time from rival candidates as the Commission expressly found (Pet. App. 95a-96a; J.A. 209-210, 97-98). Finally, although some of the networks sought to justify their actions after the fact by reference to the desires of the candidate, they failed to explain how they had taken the particular request into account and how they had attempted to accommodate it (Pet. App. 129a-133a, 137a).[32] Under these circumstances, the Commission had no alternative but to find that reasonable access had been denied.[33]

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[32] The foregoing is only a brief summary of the elements of the Commission's "reasonable access" analysis. As noted in *FCC* v. *WOKO, Inc., supra*, 329 U.S. at 229, "the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter." See also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). A more extensive discussion of the Commission's application of its standards to the facts of this particular case appears in the Commission's brief in the court of appeals at 50-91.

[33] The facts of this case differ substantially from those in the earlier cases on which the networks rely. In *Don C. Smith*, 49 F.C.C.2d 678 (Broadcast Bureau 1974), the Broadcast Bureau determined that a counter-offer of a half-hour in prime

2. The networks nonetheless protest (ABC Br. 24, 37-39; NBC Br. 17-21; CBS Br. 36-39) that the Commission should not have any role to play in determining when the campaign commences.[34] The networks

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time was reasonable, even though the time slot differed from that requested by the candidate. Contrary to CBS' assertion (Br. 39), the Broadcast Bureau did *not* "sustain[]" a counter-offer of "five-minute program periods in response to a request for a half hour." Similarly, in *Donald W. Riegle*, 59 F.C.C.2d 1314 (1976), the broadcaster made a responsive counter-offer, extending five minute segments outside of prime time as well as thirty-minute segments and spots within prime time. Likewise, in *Hon. Pete Flaherty*, 48 F.C.C.2d 838 (1974), and *WALB-TV, Inc.*, 59 F.C.C.2d 1246 (1976), all of the licensees agreed to sell substantial amounts of time during the "prime time" period.

[34] In its *1978 Report and Order*, the Commission established that "a licensee's obligation to afford reasonable access" does not attach until the campaign is in "full swing." See 68 F.C.C.2d at 1091. The Commission left no room to doubt that it would make determinations of this kind. *Id.* at 1091-1092, 1094. The Commission's willingness to determine when the campaign commences in cases of disagreement is not inconsistent with the *Martin-Trigona* rulings upon which all petitioners rely. See 66 F.C.C.2d 968 (Broadcast Bureau), review denied, 67 F.C.C.2d 33 (1977), reconsideration denied, 67 F.C.C.2d 743 (1978). That case emphasized that "the licensee, *and ultimately the Commission*, must look to the circumstances of each particular case to determine when it is reasonable for a candidate's access to begin as well as the amount and types of access which are reasonable" (*id.* at 746 n.4; emphasis added). See also *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d at 2288 ("The question of * * * when access should apply * * * will be determined by the Commission on a case by case basis.").

NBC suggests (Br. 19-20) that it is somehow more appropriate for the regulated parties—private broadcasters—to determine for themselves when their own access obligations attach than it is for a government body to make such a determination. That view can hardly be squared with Congress'

fail to recognize that the Commission's determination serves to *narrow* the statute's coverage. The statute, on its face, potentially extends access rights to every "legally qualified candidate for Federal elective office." The Commission has done nothing more than establish a limiting condition—intended to give substance to the concept of "reasonable access"—by holding that access rights do not vest until the campaign is fully underway. The statute could, of course, have been construed to vest rights in any federal candidate as soon as he becomes "legally qualified" under the Commission's rules, without regard to the stage of the campaign.[35] By prescribing a condition limiting Section 312(a)(7) to the campaign period, the Commission has confined its impact on broadcasters and has established a reasonable guidepost to govern negotiations between candidates and broadcasters, thereby minimizing the necessity for governmental intervention.[36]

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prescription that unreasonable denials of air time, as adjudicated by the Commission, subject broadcasters to sanctions. Congress not only placed the question of reasonable access in the hands of the Commission, but gave it explicit enforcement powers to assure that broadcasters would comply with their responsibilities.

[35] As NBC points out (Br. 23), several candidates in the 1980 presidential race announced their candidacies very early. The Commission's interpretation reduces the problems caused by such early announcements since, under the Commission's interpretation, a candidate cannot invoke access rights merely by announcing his candidacy and becoming legally qualified. If they desire, broadcasters may refuse to sell time to candidates before the campaign is in full swing.

[36] ABC misses the point in suggesting that the Commission will be required to issue "declarations" as to when a campaign has begun "in literally hundreds of federal congressional or

In the present case, the Commission made an independent evaluation of the status of the presidential campaign based on facts proffered by both the candidate and the networks (Pet. App. 91a-94a).[37] The Commission then rendered "a legal judgment" resting on that objective evidence (Pet. App. 28a). The Commission did not make an "editorial" decision, or otherwise evaluate program content or choice of material.[38] Instead, the Commission determined, based on ample extrinsic evidence, that the campaign was fully underway and therefore that it no longer was reasonable

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senatorial elections * * *." ABC Br. 37 n.49. By establishing standards to govern negotiations between candidates and broadcasters, the Commission has reduced the likelihood that it will be involved in case-by-case adjudication of complaints.

[37] The networks repeatedly characterize the Commission's decision as somehow triggering the campaign (NBC Br. 19; CBS Br. 36-37; ABC Br. 14, 17, 37-39, 43). As the court below pointed out, however, the Commission did not set a starting date for the campaign; it found from an abundance of objective evidence that it was already in full swing: "the Commission's determination of when the statutory obligations attach does not control the electoral process. To the contrary, the determination is controlled by the process" (Pet. App. 27a).

[38] The Commission is experienced in assessing the level of campaign activity, since that is essential in applying some of its own longstanding rules. See 47 C.F.R. 73.1940(a)(5), (f). CBS compares (Br. 35 n.83) this determination to determinations involved in applying the "fairness doctrine." However, application of the "fairness doctrine" requires review of program materials to ascertain if controversial issues have been presented and if opposing viewpoints have been expressed. In contrast, determining the commencement of a campaign requires only a consideration of extrinsic evidence relating to the existence of campaign activities in the relevant geographical area.

to completely foreclose candidates from access to the airwaves.[39]

3. The networks also contend that the Commission has acted arbitrarily by requiring them to consider candidate requests on an individual basis once the campaign commences (NBC Br. 21-27; CBS Br. 37-40; ABC Br. 39-41). However, there is nothing irrational about construing a statute which focuses on specific candidate requests for "use" of broadcast facilities as requiring individualized treatment. This does not compel the broadcaster to render a value judgment about the particular request, to second-guess the candidate or his media strategy, or to speculate about the ultimate utility of the requested time to the campaign. The Commission requires a good faith consideration of the individual request solely to assure that the broadcaster actually takes into account the stated requirements of the candidate and attempts to accommodate the request to the extent feasible. "[C]onsideration of the candidate's needs should manifest itself in a 'specific—rather than blanket—response to the individual request [which affords] greater assurance * * * that the candidate's interests cannot be ignored in the balancing process' "

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[39] As the Commission recognized in its *1978 Report and Order, supra*, 68 F.C.C.2d at 1091, "each campaign is unique with respect to the controversiality and importance of the issues involved, the public interest in the race, and the amount of campaigning done by the candidates." Thus, while some campaigns "may be limited to a short concentrated period," a "presidential campaign may be in full swing almost a year before an election." The Carter-Mondale Committee requested broadcast time approximately eleven months before the general election and eight months before the Democratic convention.

(Pet. App. 36a).[40] After all, candidates are the immediate beneficiaries of the statute, and they are granted reasonable "use" of broadcast facilities to advocate their own "candidacy." The Commission did not abuse its authority by determining that specific requests from candidates should be accommodated to the extent practicable, since any other approach would permit their individual campaign strategies simply to be "ignored."

The networks also argue (ABC Br. 15, 37, 39; CBS Br. 5, 6-7, 12, 21, 40; NBC Br. 23-25) that attention to individual needs prevents them from adopting an "evenhanded" or "uniform" policy in dealing with candidate requests. The networks are correct in asserting that they may not adopt a blanket policy of this kind.[41] It is not the purpose of Section

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[40] NBC argues (Br. 22-23) that consideration of candidate requests on an individual basis is "meaningless" unless the broadcaster is allowed to itself "assess or weigh each candidate's needs." There is no merit to this assertion. Under the Commission's analysis, the candidate's stated needs are not to be second-guessed, but rather are to be taken account of along with the broadcaster's own valid concerns—multiplicity of requests and program disruption. The Commission's approach thus precludes the adoption of blanket policies that permit a broadcaster to overlook the particular request made by the candidate.

[41] Broadcasters may, however, attempt to arrive at an overall policy in this area through agreement with candidates. The Commission repeatedly has urged broadcasters to contact candidates and attempt to arrive at such an accommodation. See *Use of Broadcast and Cablecast Facilities By Candidates for Public Office, supra,* 34 F.C.C.2d at 536: "One conceivable method of trying to act reasonably and in good faith might be for licensees, prior to an election campaign for Federal offices, to meet with candidates in an effort to work out the problem of reasonable access for them on their stations." In this case, the Commission stated: "we believe that good faith

312(a)(7) to limit candidates to uniform time rations dispensed mechanically by broadcasters. Indeed, since candidates often have differing needs and strategies for reaching the public and articulating their views, a blanket policy may intentionally or unintentionally favor one candidate versus another. The risk of such favoritism is reduced by the guarantee of reasonable access to the individual candidate. Other statutory provisions are aimed at equality of a carefully prescribed kind. Congress enacted Section 315 of the Act to permit an opposing candidate to respond to any initial political use of the airwaves, if a request for equal time is promptly made. The contingent equal opportunities requirement thus has a complementary role to play, but it does not supersede the affirmative "reasonable access" requirement of Section 312(a)(7) (Pet. App. 68a n.22).

In this connection, it is important to distinguish the operation of the equal opportunities provision, as enacted by Congress, and the uniform treatment concept proposed by the networks. Section 315 of the Act does not apply to any initial grant of access. It merely provides that, if access is granted, rival candidates may, if they choose, purchase an equivalent amount of time. This benefits the rival candidate without curtailing the right of the original candidate to present his views. The networks in this case, by contrast, propose a different scheme. They claim the right to determine in advance and on a unilateral basis how much time to afford all candidates for federal office and when to offer such time. They assert the right to adopt a blanket policy limiting, for ex-

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negotiations are to be preferred and urge that course" (Pet. App. 101a n.34)—a course that the networks refused to follow.

ample, all candidates to five minutes of air time at a particular stage of the campaign, even though one candidate may desire a half hour segment and his rival may desire several five minute segments. Thus, they would arrogate to themselves authority to determine how much broadcast exposure each candidate may have, regardless of his or her particular media strategy. It was not irrational for the Commission to reject that view of Section 312(a)(7).

The networks also misleadingly suggest that the only dispute in this case concerns whether the individual candidate should have the right to insist on a half-hour in December rather than January—and express bewilderment that they could be found to have behaved unreasonably by merely offering an alternative time slot (ABC Br. 6 n.11, 21 n.23, 41; NBC Br. 29 n. *; CBS Br. 4 n.9). These arguments are conspicuously devoid of any reference to the record. In fact, ABC stated before the Commission only that it would begin to sell some time (although it did not say in what amount or in what part of the day) on some undisclosed date in January (J.A. 41, 58). NBC merely represented that it would begin selling time at some unspecified date in the future (J.A. 42, 60 n. *). As previously noted, the preconceived policy of CBS allowed only one five minute time segment in prime time. Thus, the Commission was not faced with a record in which the networks had made specific, responsive counter-offers.[42] If such counter-offers had been

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[42] Compare *WALB, TV, Inc.*, 59 F.C.C.2d 1246, 1248 (1976) (broadcaster's refusal to grant request for five-hour block of time to presidential candidate was not unreasonable when counter offer of one-half hour was made); *Frank Church*, 37 Rad. Reg. 2d (P&F) 337 (1976) (broadcaster refusal to grant request for one-half hour of time to presidential candidate was unreasonable when counter-offer of only

made, the Commission's decision may well have been different. Indeed, the complaint may never have been filed.

4. The Commission emphasized in its orders in this case that the factors to be considered in evaluating Section 312(a)(7) requests—*e.g.*, likely multiplicity of claims for reply time and significant program disruption—are factors bearing on the broadcaster's needs and interests. The only countervailing factor that the Commission required broadcasters to consider in the balance was the candidate's stated requirements. The networks nonetheless contend in this Court that the Commission has "eviscerated" broadcaster discretion and precluded a fair evaluation of their legitimate needs (ABC Br. 14; NBC Br. 29-30 n.*; CBS Br. 38). In making this assertion, the networks simply ignore the fact that they never have offered *any* good reason for rejecting the request of the Committee.

The networks wholly failed to demonstrate any reasonable prospect of a large number of requests for equal time if they honored the request made by the Committee.[43] On the record in this case, the Commis-

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five minutes was made). No request for time need be honored under Section 312(a)(7), of course, unless the candidate is willing to pay for that time. See *Kennedy for President Committee* v. *FCC*, No. 80-1549 (D.C. Cir. Aug. 6, 1980), slip op. 36.

[43] There were approximately a dozen major candidates at the relevant time who *might* have made requests for equal time (Pet. App. 92a). However, only candidates for the *Democratic* nomination, who were legally qualified under the Commission's rules, and who requested time within seven days, would be entitled to "equal opportunities" under Section 315(a). See 47 C.F.R. 73.1940(a), (e), (f); *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d

sion reasonably concluded that the networks' claims of multiple requests for equal time were "speculative and unsubstantiated at best" (Pet. App. 138a).

Likewise, no issue of "program disruption" ever arose on this record.[44] No colorable claim of disruption could be predicated on the sale of a single half-hour to a political candidate, requested two months in advance. This is particularly true where, as here, the candidate specified no particular slot within the prime time range and selected four alternative days.[45]

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at 2218. Moreover, economic realities also stood in the way of any significant number of such requests in December 1979, either under Section 315(a) or 312(a)(7). The cost of a half hour of prime time was then as much as $186,000, and President Carter alone had qualified for federal matching funds (J.A. 171, 209 n.*). Further, the networks never claimed to have contacted any rival candidates to determine their likely responses (Pet. App. 126a, 138a). Finally, subsequent events confirmed the reasonableness of the Commission's finding that there was no realistic danger of an outpouring of such requests. President Carter ultimately succeeded in purchasing five minutes of time from CBS in December and thirty minutes of time from ABC in January (Pet. App. 11a). There is no indication that either network received *even a single request for equal time,* much less a large number of such requests, following those broadcasts.

[44] The Commission has recognized that undue program disruption would occur, for example, if multiple requests for equal time in the closing days of a campaign resulted in political programming "to the exclusion of all or most other types of programming." *Use of Broadcast and Cablecast Facilities by Candidates for Public Office, supra,* 34 F.C.C. 2d at 536. The Commission has thus acknowledged that Congress did not intend "that all or most time be preempted for political broadcasts." *Ibid.*

[45] Each network had 44 half hours of prime time programming per week, for a three network monthly total of 528 half hours. The Carter-Mondale Committee sought to purchase

And, as previously noted, the record in this case did not support a claim that requests for equal time were likely to be tendered in any significant number.

In short, the Commission was prepared in this case to listen to any reasonable explanation offered by the networks for their refusal to provide time. That explanation was never forthcoming. In this context, the networks should not be heard to complain that their discretionary judgment was not heeded. At bottom, the networks argue in this case that *any* asserted justification for refusing time, clothed in the rhetoric of "broadcaster discretion," must be accepted by the candidate and the Commission, regardless of its factual basis. Such a view would nullify the reasonable access obligation prescribed by Congress in Section 312(a)(7).[46]

III. SECTION 312(a)(7), AS IMPLEMENTED BY THE COMMISSION, MAKES A SIGNIFICANT CONTRIBUTION TO FREEDOM OF EXPRESSION ON ISSUES OF VITAL IMPORTANCE AND DOES NOT IMPERMISSIBLY INTERFERE WITH BROADCASTERS' FIRST AMENDMENT RIGHTS

All of the networks base their final challenge to Section 312(a)(7), as interpreted by the Commission

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only one of those half hours. Networks, of course, frequently alter their scheduled programming to serve their own commercial interests. See B. Cole, *Television Today* 6-7 (1981).

[46] The networks' exaggerated claims of "eviscerated" discretion are perhaps best answered by *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (1966) (Burger, J.): "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened with enforceable public obligations. * * * After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust * * *."

and as applied in this case, on the First Amendment (ABC Br. 43-49; CBS Br. 40-49; NBC Br. 25-33). The familiar terms of the First Amendment provide that "Congress shall make no law * * * abridging the freedom of speech, or the press * * *." Far from "abridging" freedom of speech or the press, Section 312(a)(7) "makes a tremendous positive contribution to the cause of freedom of expression" (Pet. App. 65a; Tamm, J., concurring). Congress enacted this provision to "give increased play to ideas touching the very essence of our democracy"—a "goal that surely lies near the heart of the first amendment" (*id.* at 67a).

Section 312(a)(7) facilitates freedom of expression by candidates and permits voters to hear information of vital importance to them. Moreover, the Commission has not ignored the legitimate interests of broadcasters in effectuating these objectives. The record in this case clearly shows that the Commission has bent every effort to accommodate all of the First Amendment interests at stake. As the Commission explained (*id.* at 90a):

> [W]e recognize that our decision concerns First Amendment interests—both those of the general public in full-ranging debate on electorate informing issues and those of broadcasting journalists in preserving their editorial discretion. While the constitutionality *vel non* of Section 312(a)(7) is basically a matter for Congress and the courts, we must interpret the statute, if possible, to effectuate Congress' intent while not unnecessarily impinging on the broadcasters' journalistic discretion.

The Commission added that it was fully aware that Section 312(a)(7) "must be applied with First Amendment interests in mind" (*id.* at 90a n. 18). As we demonstrate below, the Commission has suc-

ceeded in the "delicate balancing of competing interests" called for by the First Amendment. *CBS Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 117.

A. The Statute, as Interpreted by the Commission, Facilitates Free Expression by Candidates

The court of appeals correctly highlighted the importance of the broadcast media in a democratic society, and stressed the unique utility of such media in communicating the views of candidates (Pet. App. 11a-12a). Access to program time on national television networks permits candidates to present their views on political issues in homes throughout the nation; conversely, denial of access effectively obstructs such communication.[47] Congress enacted Section 312(a)(7) precisely because candidate access to the broadcast media had been denied unreasonably in the past and a guarantee of "reasonable access" was essential to facilitate the operation of the democratic process (see pages 26-32, *supra*).[48]

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[47] The Carter-Mondale Committee stated in its affidavit filed with the Commission (J.A. 209): "There are no feasible alternatives to purchasing time for the half-hour program on one of the three respondent networks on, or as close as possible to, the date of the President's announcement as originally requested. * * * Attempting at this point to purchase comparable time on the hundreds of individual stations required to duplicate network coverage would be prohibitively expensive and logistically impractical, if not completely impossible."

[48] As Professor Emerson has observed: "There are numerous reasons for the failures now threatening the existence of the system [of freedom of expression]. Probably the most significant is the overpowering monopoly over the means of communication acquired by the mass media. * * * Three gigantic networks, ABC, CBS and NBC, determine most of what is seen in American homes on television." T. Emerson, *The*

Candidates, of course, have First Amendment rights to present their views to potential voters. As this Court observed in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 52-53:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.[49]

See also *id.* at 48. Accordingly, a statute aimed at securing "reasonable access" to the airwaves for candidates is a "congressional effort, not to abridge, restrict, or censor speech, but rather * * * to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. See also *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 375, 394; *FCC* v. *National Citizens Committee for Broadcasting*, *supra*,

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System of Freedom of Expression 627-628 (1970). At the same time that it enacted Section 312(a)(7), Congress rejected proposals that the equal opportunities provision contained in Section 315 should be repealed. At that time, Congress expressed deep concern that unfettered control of the airwaves by broadcasters would stifle political communication. See 117 Cong. Rec. 43150 (1971) (remarks of Rep. Dingell); *id.* at 43168 (remarks of Rep. Harvey).

[49] The First Amendment right of candidates to advocate their election does not, in itself, include the right to demand access to television or radio. Congress enacted Section 312(a)(7), vesting candidates with a *statutory* right of access, to facilitate their First Amendment rights.

436 U.S. at 801-802; *The System of Freedom of Expression, supra,* at 629-630, 664-667.

The Commission's interpretation of Section 312 (a)(7), which requires consideration of the media plans of the individual candidate, is entirely consistent with this Court's recognition that it is essential for each candidate to "vigorously and tirelessly advocate his own election." [50] If broadcasters could simply ignore the stated requirements of a candidate, or decide unilaterally when air time should be made available for sale, the candidate's ability to communicate with the public—in a manner that is most efficient and conducive to the presentation of his own particular message—would be seriously eroded.[51]

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[50] The purposes of the First Amendment are best served by affording reasonable attention to the individual requests of candidates. If broadcasters had unilateral power to dictate formats, program lengths, and broadcast times, then broadcasters, not candidates, would decide what could be said to the public and when. This would constitute effective censorship by broadcasters of the expression of candidates. In this respect, the networks' assertion that they offer adequate coverage to candidates in newscasts is completely beside the point. The interest of a candidate in communicating his views is poorly served, if at all, when reliance must be placed on others to filter and edit the presentation. Candidates are entitled to have their views presented by " 'persons who actually believe them; who defend them in earnest, and do their very utmost for them.' " *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 392 n.18 (citation omitted).

[51] The fact that candidates with substantial economic resources may purchase more time than those who do not is not an argument against affording individualized treatment. The expenditure of funds to promote one's candidacy is itself an aspect of protected free speech. See *Buckley* v. *Valeo, supra,* 424 U.S. at 39, 54, 57. Moreover, flexibility in purchasing time on broadcast stations may be essential to a candidate of limited means who wishes to mount an early, effective media

B. The Statute, as Interpreted by the Commission, Facilitates the Right of Voters to Receive Information About Political Candidates

The right of the public to receive information about political candidates is correlative to the right of candidates to advocate their views. In the hierarchy of First Amendment rights, the right of the public to receive this information—and to participate in the process of self-government on an informed basis—is supreme. Regardless of the party affiliation of a particular candidate, the public requires information about the candidate to cast the ballot in an intelligent manner. That information is of utmost importance to the public because it is an essential ingredient in the effective functioning of representative government.

The Commission's enforcement of the "reasonable access" provision in cases such as this facilitates the public's right to receive essential political information.[52] As this Court has observed, "[i]t is the right of the public to receive suitable access to * * * political * * * ideas and experiences which is crucial here." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390. Stated otherwise, "[i]t is the right of the

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campaign in order to acquire additional financial support. Flexible access to the media may be essential in establishing name recognition for the newcomer, just as it is for an incumbent wishing to pursue his own individual media strategy.

[52] Contrary to the networks' suggestion (CBS Br. 35, 45; NBC Br. 48-49), Section 312(a)(7) does not merely facilitate the free speech of candidates. It also serves to "more fully and completely inform the voters." See S. Rep. No. 92-96, *supra* at 20, 23. The Commission has consistently construed the statute with that understanding. See *1978 Report and Order*, *supra*, 68 F.C.C.2d at 1087-1089; *Licensee Responsibility under Amendments to the Communications Act made by the Federal Election Campaign Act of 1971*, *supra*, 47 F.C.C.2d at 517; Pet. App. 90a, 123a, 134a.

viewers and listeners, not the right of the broadcasters, which is paramount." *Ibid. See also CBS, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 122 ("it must constantly be kept in mind that the interest of the public is our foremost concern"). See also *Buckley* v. *Valeo, supra,* 424 U.S. at 14-15, emphasizing that the First Amendment has " 'its fullest and most urgent application' " in protecting the public's right to information about political candidates, since, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."

The statute, on its face, makes a significant contribution to this objective. It assures that candidates have reasonable access to the airwaves to reach the electorate. And, as interpreted by the Commission, it is effective in doing its job. The Commission has interpreted it to apply precisely when the public needs information most—when the campaign is fully underway. Moreover, the Commission has interpreted it to require attention to the media strategy of individual candidates so that those candidates may, with the help of their advisers, chart the course that is best adapted to reaching the intended audience.

In short, if the Commission and the courts were to accept the position of the networks here—two of which denied the candidate any time and one of which offered only five minutes to summarize a three year term in office—that decision not only would fail to give effect to the statute but also would disregard the constitutional precept that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964); *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 776-777 (1978).

C. The Statute, as Interpreted by the Commission, Does Not Unduly Restrict the Discretion of Broadcasters

Despite its manifest contribution to the cause of political free speech, the networks nonetheless contend that Section 312(a)(7), as construed by the Commission, impairs their discretion to such a degree that it cannot survive constitutional scrutiny. In response to that assertion, several preliminary observations are in order. The statute does not preclude broadcasters from presenting their views on any issue or from carrying entertainment or public affairs programming. It calls for no governmental surveillance of the contents of their broadcasts, and has no impact on their news and editorial presentations. Finally, it does not require broadcasters to evaluate the contents of political programming proposed by candidates, and it does not require them to choose among or discriminate against candidates. The statute simply requires broadcasters to afford candidates for federal office reasonable access to the airwaves, and to adhere to standards prescribed by the Commission in considering individual requests. Thus, as in *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 396:

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to [47 U.S.C.] § 326; or of the official government view dominating public broadcasting.

At bottom, then, the networks' First Amendment arguments in this case resolve into the assertion that

affording reasonable access is an improper impairment of their discretion to broadcast what they please, and that the Commission's standards cannot be enforced without undue intrusion into their affairs.

1. The argument that broadcasters have a First Amendment right to resist Congress' allocation of air time for political "uses" is completely without merit. As this Court held in *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 389:

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which * * * otherwise, by necessity, [would] be barred from the airwaves.

The Court added that "the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 390.[53] Thus, due to the overriding public interest in the use of limited broadcast frequencies, this Court's decisions consistently have recognized that "of

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[53] In upholding the Commission's "fairness doctrine" in *Red Lion*, the Court observed that "[r]ather than confer frequency monopolies on a relatively small number of licensees * * * the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time [to persons seeking to offer a rebuttal]." 395 U.S. at 390-391.

all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978); See also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 798-802 (1978) ("efforts to 'enhanc[e] the volume and quality of coverage' of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be"); *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 94, 101-103; *NBC* v. *United States*, 319 U.S. 190, 226-227 (1943). These precedents clearly confirm Congress' authority to "re-allocat[e] the 'use' of portions of the airwaves from the licensee to the candidate" (Pet. App. 47a)—as it has done under Section 312(a)(7).[54]

This Court's decision in *CBS, Inc.* v. *Democratic National Committee*, *supra*, confirms the correctness of the decision of the court of appeals in this case. In

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[54] CBS argues (Br. 43) that once Congress vests broadcasters with discretion in conducting their affairs, it may not thereafter interfere with the freedom that it has conferred. However, following the enactment of Section 312(a)(7) in 1972, no broadcaster could have expected to exercise "editorial discretion" to deny a federal candidate's request for reasonable access. As this Court recognized in *Red Lion*, moreover, it is proper for Congress to reallocate "use" of the broadcast spectrum to accommodate the needs of political candidates. Congress has long regulated the limited broadcast spectrum by dividing its use between private broadcasters and political candidates, and has divested broadcasters of "editorial discretion" over the presentations of political candidates. See *Farmers Union* v. *WDAY*, *supra*, 360 U.S. at 529. In short, with respect to airtime that Congress has reallocated for political use, broadcasters possess no editorial discretion.

that case, this Court reversed a decision of the court of appeals which had compelled the Commission to adopt regulations requiring broadcasters to make time available to the general public. The Court found no statutory authority, or authority in Commission precedent, for such a requirement. Here, by contrast, *Congress* has prescribed the right of access for federal candidates and the Commission has implemented it. In these circumstances, the teaching of *Democratic National Committee* is plain: "[I]n evaluating the First Amendment claims of [the litigants], we must afford great weight to the decisions of Congress and the experience of the Commission. * * * The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." 412 U.S. at 102-103. More specifically, as the Court recognized in *Democratic National Committee*, it is permissible for Congress to devise a "limited right of access that is both practicable and desirable" (*id.* at 131).[55]

2. Broadcasters do, of course, receive certain protections from the First Amendment. The broadcasting industry is entitled to exercise "the widest journalistic freedom *consistent with its public obligations.*" *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 110 (emphasis supplied). In this

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[55] *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 709 (1979), has no bearing on the question presented here. The Court held in that case that "authority to compel cable operators to provide common carriage of public originated transmissions must come specifically from Congress." The Court expressed no views on the First Amendment in that case. *Id.* at 709 n.19. Here, by contrast, Congress *has* granted a specific right of reasonable access to political candidates and has given the Commission power to effectuate that right.

case, the statute, as implemented by the Commission, affords broadcasters the widest measure of discretion that is consistent with the essential First Amendment interests of political candidates and the voting public. Section 312(a)(7) imposes obligations only with respect to a narrow and precisely defined group—legally qualified candidates for federal office.[56] Moreover, the access right is limited to a specific "use," that is, advocacy of candidacy for office. Thus, complexities of the kind associated with the general public access scheme considered in *CBS, Inc.* v. *Democratic National Committee* are largely avoided. Congress has specified who is entitled to invoke the statute (candidates for federal elective office) and for what purpose (to advocate their candidacies). And it also has identified, under Section 315(a) of the Act, those who are entitled to "equal opportunities" for reply.[57] Under this statutory scheme, moreover, broadcasters need not (indeed, may not) evaluate or edit the programming that candidates seek to present to the public. In short, the statute imposes narrowly drawn obligations on broadcasters and is largely self-executing, particularly as construed by the Commission.

The Commission's interpretation of Section 312(a)(7) provides guidance for broadcasters seeking to

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[56] The Commission has adopted specific standards for defining who is a "legally qualified candidate" entitled to invoke Sections 312(a)(7) and 315 of the Act. See 47 C.F.R. 73.1940(a), (f).

[57] Equal opportunities under Section 315 of the Act are available according to straightforward legal standards. If a broadcaster grants access under Section 312(a)(7), equal opportunities must be afforded to rivals who so request within seven days. See *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d at 2215-2224.

negotiate with candidates without Commission intervention and minimizes the burdens imposed by the statute. Under the Commission's interpretation, the statute does not apply until the campaign is fully underway, as established by objective evidence described in the Commission's opinion (Pet. App. 92a-94a). Furthermore, the Commission has guided broadcasters on how they should treat individual requests once the campaign commences. They must attempt to accommodate the particular request of the candidate to the extent practicable, weighing in the balance the countervailing factors of program disruption and multiple requests for equal opportunities. If they do this reasonably and in good faith, the Commission will not reverse their determination (Pet. App. 86a-87a & n.16).[58] Thus, by fashioning standards under the congressionally prescribed rule of reason, and applying those standards with deference to the broadcaster's discretion, the Commission has successfully walked the "tightrope" and balanced the competing First Amendment interests of candidates, voters, and broadcasters. *CBS, Inc.* v. *Democratic National Committee, supra*, 412 U.S. at 117.[59]

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[58] As the court of appeals pointed out (Pet. App. 46a), the Commission's review function is limited to two essential inquiries: 1) did the broadcaster consider the relevant factors? and 2) did the broadcaster reasonably explain the basis for its decision in terms of those factors?

[59] The Commission's standards, of course, cannot be applied with the simplicity of a mathematical formula. The "rule of reason" prescribed by Congress requires attention to the facts of each particular case. This, however, does not invalidate the Commission's approach. See *Red Lion Broadcasting Co.* v. *FCC, supra*, 395 U.S. at 395: "The litigants embellish their First Amendment arguments with the contention that the regulations are so vague that their duties are impossible to

3. Nothing on the record in this case suggests that the reasonable discretion of broadcasters has been ignored. The Commission has not second-guessed any good faith effort on the part of the networks to accommodate the needs of an individual candidate, and the Commission has not rejected any factually-supported claim of business necessity. Nor has it imposed any obligation that would disrupt entertainment programming. Indeed, the Commission has not imposed sanctions of any kind on any broadcaster. It simply ordered the networks to state how they would comply with the statute. See *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 396 (the Commission "will not impose sanctions in such cases without warning"). Finally, there is no evidence on this record of a continuing, day to day surveillance of networks in their dealing with candidates. To the contrary, the Commission has announced standards with the expectation that those standards will be largely self-executing, through the good faith efforts of broadcasters and candidates alike, and that questions of reasonable access ordinarily will be resolved through negotiation.[60]

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discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply."

[60] In cases of stalemate, the candidate may complain to the Commission or the network may seek a declaratory ruling.

In this context, it is unnecessary to speculate about abuses of the statute that might occur if it were administered in bad faith or with disregard for the interests of all concerned. It is enough here to note that the Commission has made a painstaking effort to balance the rights of broadcasters, candidates, and the voting public, and that there is no reason to presume that it will follow any different course in the future. As the Court observed in *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 743: "[i]nvalidating any rule on the basis of its hypothetical application to situations not before the court is 'strong medicine' to be applied 'sparingly and only as a last resort.'" For this reason, the constitutionality of Section 312(a)(7), as interpreted by the Commission, should not be tested "by envisioning the most extreme applications conceivable." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 396. If abuses should occur in the future, reviewing courts may "deal with those prob-

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See 47 C.F.R. 1.2. The possibility of Commission intervention, however, should have no relevant "chilling effect." The potential intervention of the agency may cause broadcasters to listen with greater seriousness to individual requests from candidates, but that is precisely the effect that Congress sought to achieve. And, in those circumstances, the potential involvement of the agency would enlarge, not contract, freedom of speech. Moreover, there is no reason to expect that this kind of oversight will have a "chilling effect" on commerical programming. This Court has observed, with respect to profitable commercial speech in general, that "there is little likelihood of its being chilled by proper regulation and foregone entirely." *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 772 n.24 (1976). See also *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 392-393; *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 742-743.

lems, if and when they arise." *Ibid;* see also Pet. App. 47a n.117, 62a-68a.[61]

In sum, Section 312(a)(7), as construed by the Commission, guarantees to candidates and voters the opportunity to exchange information essential to the exercise of the fundamental right to vote. The legitimate interests of candidates and voters must be weighed in the balance along with the commercial concerns of broadcasters. The Commission's interpretation assures that intrusion on the discretion of broadcasters is reduced to the minimum level that is consistent with the public necessity. Under these circumstances, it is appropriate to afford "weight to the decisions of Congress and the experience of the Commission" (*CBS, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 102), and to reject the constitutional arguments advanced by the networks.

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[61] It is noteworthy that, in the present case, the networks obtained a stay from the court of appeals which relieved them of any duty to comply with the Commission's order while they litigated the propriety of that order (without success) in the court of appeals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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